INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	9
Conclusion	16

CITATIONS

Cases:	
Allen v. *United States*, 89 F. 2d 954	14
Blue v. *United States*, 138 F. 2d 351, certiorari denied, 322 U. S. 736–737	14
Braverman v. *United States*, 317 U. S. 49	14
Carlson v. *United States*, 187 F. 2d 366, certiorari denied, 341 U. S. 940	14
Clark v. *United States*, 289 U. S. 1	10
Dobbins v. *United States*, 157 F. 2d 257	10
Hayes v. *United States*, 168 F. 2d 996	11
Lutwak v. *United States*, 344 U. S. 604	10, 11
Mackett v. *United States*, 90 F. 2d 462	14
Mansfield v. *United States*, 155 F. 2d 952, certiorari denied, 329 U. S. 792	13, 14
Pinkerton v. *United States*, 328 U. S. 640	13
United States v. *Bender*, 60 F. 2d 56	14
United States v. *Cohen*, 145 F. 2d 82, certiorari denied, 323 U. S. 799	14
United States v. *Graham*, 87 F. Supp. 237	11
United States v. *Katz*, 271 U. S. 354	13
United States v. *Mitchell*, 137 F. 2d 1006, certiorari denied, 321 U. S. 794	10, 11
United States v. *Walker*, 176 F. 2d 564, certiorari denied, 338 U. S. 891	12
United States v. *Zeuli*, 137 F. 2d 845	13
Wolfle v. *United States*, 291 U. S. 7	10
Statutes:	
18 U. S. C. (Supp. V):	
371	3
1341	2, 4
2314	3, 4
Miscellaneous:	
8 Wigmore:	
§ 2332	11
§ 2337	10
§ 2338 (1)	11
§ 2341 (2)	10

256456—53——1

BLURRED COPY

BLEED THROUGH- POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 764

VICTOR EMANUEL PEREIRA AND EUGENE H. BRADING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 279–290) is reported at 202 F. 2d 830.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1953 (R. 291). A petition for rehearing was filed March 26, 1953 (R. 292–297), and denied on April 3, 1953 (R. 299). The petition for a writ of certiorari was filed on April 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

BLURRED COPY

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting testimony by a divorced wife, who was the victim of a fraud, as to certain communications, asserted to be confidential, from her then husband, who was one of the perpetrators of the fraud.

2. Whether conviction and the imposition of a cumulative sentence on a charge of conspiracy to commit the substantive offenses charged in the indictment amounted to double jeopardy.

3. Whether there was sufficient evidence to sustain the conviction on the conspiracy count.

4. Whether there was sufficient evidence of the mailing of the fraudulently obtained check to sustain the convictions of both petitioners for using the mails in executing a scheme to defraud and causing the interstate transportation of an article obtained by fraud.

STATUTES INVOLVED

18 U. S. C. (Supp. V) 1341, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent

BLEED THROUGH– POOR COPY

> or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon * * * any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U. S. C. (Supp. V) 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

18 U. S. C. (Supp. V) 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

STATEMENT

Petitioners were convicted on three counts—one, ten and eleven—of an indictment returned

BLURRED COPY

against them in the United States District Court for the Western District of Texas (R. 1–9, 257),[1] all of which arose out of a scheme to defraud the former wife of Pereira. Count one charged that petitioners, for the purpose of executing this scheme, caused a letter to be mailed on June 15, 1951, to the Citizen's National Trust & Savings Bank, Los Angeles, California, in violation of 18 U. S. C. 1341, *supra,* pp. 2–3 (R. 2–3). Count ten charged that on or about the same date petitioners caused a check in the amount of $35,286.78 to be transported in interstate commerce from El Paso, Texas, to Los Angeles, California, knowing such check to have been obtained by fraud, in violation of 18 U. S. C. 2314, *supra,* p. 3 (R. 8). Count eleven charged petitioners with conspiring to commit the substantive offenses charged in the preceding counts (R. 8–9). The court sentenced both men to five years' imprisonment on count one, ten years on count ten to run concurrently with the sentence under count one, and two years on count eleven to commence at the expiration of the sentence on count ten (R. 261). On appeal, the judgment of conviction was affirmed as to both petitioners by the Court of Appeals for the Fifth Circuit, Chief Judge Hutcheson dissenting in part (R. 291).

At the trial the Government relied principally upon the testimony of the victim, Mrs. Joyce, who

[1] At the close of the Government's case, the Government moved to dismiss counts 2 through 9, no proof having been attempted as to those counts (R. 209).

BLEED THROUGH– POOR COPY

had been married to petitioner Pereira but was divorced from him by the time of the trial (R. 61). Corroboration of significant points of her testimony and proof of certain elements of the offenses charged in the indictment were, however, provided by other Government witnesses. Petitioners presented no witnesses and did not take the stand on their own behalf.

Mrs. Joyce gave the following account:

She first met petitioners when one of them, Brading (known to her as James Bradley Lee), approached her in the Del Norte Hotel in El Paso, Texas, on April 19, 1951, and started a conversation (R. 62–64). When he invited her and her half-sister, Miss Joyner, to join him and a friend (petitioner Pereira) in the cocktail lounge, she accepted the invitation. This was followed by a trip to Juarez, Mexico, for dinner and a tour of the night spots (R. 65–67). Petitioner Pereira appeared to be delighted with her, told her that meeting her was an "epoch in his life," and represented that he was in the hotel business in Denver and was in the process of getting a divorce (R. 66). Within a short time petitioners were invited to stay as house guests at Mrs. Joyce's home in Roswell, New Mexico (R. 67). There Pereira received a telegram informing him that his divorce would be final on April 27 but that he would not receive his property settlement for another month (R. 68). Mrs. Joyce was informed by petitioner Brading that the delay with respect

BLURRED COPY

to the settlement was quite unfortunate for Pereira since it might cause him to miss out on some very promising oil deals (R. 69). She thereupon borrowed the $5,000 that Brading indicated was needed and loaned this sum to Pereira (R. 71).

A few days later, Pereira suggested to Mrs. Joyce that they take a trip together so that they might get better acquainted (R. 72). At Wichita Falls, Texas, their first stop, petitioner Brading joined them (R. 74), and a few days later, on about May 15, the three of them drove to Dallas (R. 77). After spending a few days in Dallas, Pereira and Mrs. Joyce motored to Hot Springs, Arkansas, where they decided they were in love and would get married (R. 81). When Brading arrived at Hot Springs, Pereira told him in the victim's presence that in view of his impending marriage he would have to get out of the oil business and would get a hotel "here in East Texas because I must have an income" (R. 82). Shortly thereafter Pereira and Mrs. Joyce flew to Kansas City where they were married on May 25, 1951 (R. 83).

Two or three days after the wedding, Pereira began what purported to be negotiations for the purchase of a hotel in Greenville, Texas (R. 87). It is this transaction that underlies counts one and ten of the indictment. In the presence of Brading, Pereira informed Mrs. Joyce that he had found a hotel that he thought he would be

BLEED THROUGH– POOR COPY

interested in buying, and proposed that the three of them, together with Miss Joyner, should stop at Greenville and look it over on their way to Dallas. When they went into the hotel, Pereira cautioned them not to indicate that they were interested in buying but just to "look at it from an outsider's viewpoint." (R. 89.)

In Dallas, Pereira proposed that Mrs. Joyce go in with him on the deal. She attempted to contact her broker in California to get him to sell some securities, but was unable to reach him at that time. Pereira then went to see his ostensible broker, one E. J. Wilson, in Fort Worth, and returned with what he represented to be an option to buy the hotel at Greenville. (R. 90.) Mrs. Joyce heard Pereira call his lawyer in Denver for the supposed purpose of getting $2,500 for the down payment (R. 91–92). Subsequently, she heard Pereira call his broker, Wilson, and ask for an extension on the option. A few days later the extension was confirmed by a telegram from Mr. Wilson. (R. 93.)

About the same time Mrs. Joyce, having meanwhile contacted her broker, received a check for about $35,000 (R. 93) [2] which shortly thereafter she endorsed to Pereira, who then took it to the State National Bank at El Paso (R. 94). A few days later Pereira made arrangements to go to Greenville with Mrs. Joyce in order to close the

[2] This check was introduced in evidence as Government Exhibit G–4 (R. 95).

BLURRED COPY

hotel deal on June 20. However, on the 19th he and Brading left in Mrs. Joyce's Cadillac, and that was the last she saw of either of them until the trial. (R. 98–99.)

Mrs. Joyce's half-sister, Miss Joyner, testified that they had met petitioners in the way Mrs. Joyce had described, that a courtship started between Pereira and Mrs. Joyce, that Pereira had indicated he was about to get a divorce, and that they had stopped at Greenville so that Pereira might look over the hotel (R. 139–143). A relative of Mrs. Joyce testified that she had met Pereira, that he had said he loved Mrs. Joyce, and that he was the owner of several hotels and was going to Greenville to take an option on another (R. 171–174).

The clerks of the two Denver courts having divorce jurisdiction testified that there was no record that anyone with a name like Pereira had a divorce action pending during 1951 (R. 144, 160). The owner and the lessee of the Washington Hotel in Greenville both testified that, at the time Pereira ostensibly was negotiating for the purchase of the hotel, no one by the name of Pereira or Wilson had ever approached either of them about buying the hotel or obtaining any option to buy (R. 149, 161). A Denver friend of Pereira's testified that he received a letter from Pereira enclosing a printed telegram blank signed "Curtis;" that the telegram stated that Pereira's divorce would be final effective April 28, and his

BLEED THROUGH– POOR COPY

property settlement would be about $48,000; and that he had sent this telegram to Pereira at Roswell, New Mexico (R. 150–155, 147). An F. B. I. handwriting expert testified that the printing on the telegram blank was Pereira's (R. 198). Another Government witness, the operator of a telephone answering service in Fort Worth, identified petitioner Brading as a former customer who was known to the witness as E. J. Wilson (R. 207).

A vice president of the State National Bank at El Paso testified that Pereira had an account there, that a cashier's check payable to Pereira for $35,286.01 had been issued, and that the paying teller's stamp showed payment on June 19, 1951, the day petitioners had left Roswell in Mrs. Joyce's Cadillac (R. 186–194). A clerk in the same bank testified that Pereira came to his window and presented a check drawn on a California bank for about $35,000, that he had forwarded the check to Los Angeles for collection, that after payment by the Los Angeles bank he had issued a cashier's check to Pereira, and that the paying teller had asked him to identify Pereira, which he had done (R. 202–203). The bank vice president had testified earlier that the check had been forwarded to the Los Angeles Bank through the United States mails (R. 193).

ARGUMENT

1. Petitioners contend that certain testimony by Mrs. Joyce related to confidential communi-

BLURRED COPY

cations between her and her then husband, Pereira, and was improperly admitted at the trial. It is true that the privilege for marital confidences survives divorce (8 Wigmore, § 2341 (2)), but in the circumstances of the present case it has no application, even assuming that the communications were of the sort ordinarily given protection.[3]

The court below held that the privilege did not apply because "the marriage relation was merely a sham and a pretense dishonestly assumed as a means of perpetrating a fraud" (R. 284). Cf. *Clark* v. *United States,* 289 U. S. 1. This sound reasoning finds support in the recent decision of this Court in *Lutwak* v. *United States,* 344 U. S. 604, where the Court held that an ostensible spouse who had entered into a sham marriage could not invoke the fraudulent marital status as a basis for excluding the other spouse's testimony.

---

[3] One of the conversations objected to occurred in the presence of a third person (R. 88), and so was not privileged (*Wolfle* v. *United States*, 291 U. S. 7, 14); two of the alleged confidential communications involved the taking of money by Pereira (R. 84, 93), which is not ordinarily a communication within the scope of the privilege (8 Wigmore, § 2337; see *United States* v. *Mitchell*, 137 F. 2d 1006, 1009 (C. A. 2), certiorari denied, 321 U. S. 794); and the final conversation to which objection was made related to Pereira's invitation to join with him in the hotel venture (R. 90). Since even this conversation concerned prospective business transactions which by their nature would require communications to third persons, it is doubtful whether the privilege should apply. *Dobbins* v. *United States*, 157 F. 2d 257, 260 (C. A. D. C.).

BLEED THROUGH– POOR COPY

Here, as in *Lutwak,* it would be a "hollow mockery" (344 U. S. at 615) to apply the policy of preserving and fostering the marital relationship, which underlies the marital confidences privilege (8 Wigmore, § 2332) as well as the privilege against a spouse's adverse testimony, to a case where the marriage was from its inception, at least on the part of the party claiming the privilege, not *bona fide* but for the sole purpose of perpetrating a fraud.

It is, however, not necessary to rely on the *Lutwak* case in order to hold the privilege inapplicable. It has long been recognized that the marital communications privilege is subject to exception where the purpose of the proposed testimony is to prove an injury by the defendant to the spouse who is testifying. 8 Wigmore, § 2338 (1). This exception has been applied in criminal prosecutions where a husband had transported his wife in interstate commerce for immoral purposes. *Hayes* v. *United States,* 168 F. 2d 996 (C. A. 10); *United States* v. *Mitchell,* 137 F. 2d 1006 (C. A. 2), certiorari denied, 321 U. S. 794. And in *United States* v. *Graham,* 87 F. Supp. 237 (E. D. Mich.), as in the present case, the court held that a wife could testify against her husband at a trial for transporting in interstate commerce a sum of money taken from her by fraud. The propriety of this conclusion seems obvious; it works a grotesque distortion to hold that a party, having wrecked his marriage

BLURRED COPY

by perpetrating a crime against his spouse, may escape punishment by asserting his marital status as a means of suppressing what is likely to be the only available proof of the offense.

In *United States* v. *Walker,* 176 F. 2d 564 (C. A. 2), certiorari denied, 338 U. S. 891, upon which petitioner mistakenly relies (Pet. 9, 19), the court, in holding that a divorced wife who was not herself the victim of the offense for which her former husband was on trial could not testify as to confidential communications during the marriage, concluded (176 F. 2d at 568):

> We do not forget that a wife from the earliest times was competent to testify against her husband, when the crime was an offense against her person; and we have ourselves extended the exception to the crime of transporting her as a prostitute in interstate commerce * * *. The same exception probably extends to the privilege against the admission of confidential communications. The case at bar is not, however, within this exception *for Clara Duerr Walker was not the victim of the frauds for which the defendant was being tried.* [Emphasis added.]

Here the wife was herself the victim of the fraud, and could therefore testify as to the injury done her.

2. Petitioners' contention that the conspiracy count was improperly included in the indictment is without merit. No double punishment for a

BLEED THROUGH– POOR COPY

single offense has resulted from the imposition of a cumulative sentence on the conspiracy count, for conspiracy is a crime separate and distinct from the substantive offense that is the object. As this Court observed in *Pinkerton* v. *United States,* 328 U. S. 640, 644:

> A conspiracy is a partnership in crime. * * * It has ingredients, as well as implications, distinct from the completion of the unlawful project.

This principle is not affected by the circumstance that two persons were charged with having committed each of the substantive offenses. It is true that where two persons must necessarily agree in order to accomplish the substantive crime, it is improper to add a conspiracy count, since all the elements of a conspiracy are present in the completed substantive crime. *United States* v. *Katz,* 271 U. S. 354. However, neither using the mails in a scheme to defraud nor causing the interstate transportation of stolen property necessarily involves the cooperation of two or more persons; the agreement to commit such offenses is a new element of criminality not implied by the substantive crimes. Cf. *United States* v. *Zeuli,* 137 F. 2d 845 (C. A. 2).

Convictions under indictments charging violation of both the mail fraud and the conspiracy statutes have been consistently upheld by courts of appeals (*Mansfield* v. *United States,* 155 F. 2d 952 (C. A. 5), certiorari denied, 329 U. S. 792;

BLURRED COPY

Blue v. *United States,* 138 F. 2d 351 (C. A. 6), certiorari denied, 322 U. S. 736–737; *Mackett* v. *United States,* 90 F. 2d 462 (C. A. 7); *United States* v. *Bender,* 60 F. 2d 56 (C. A. 2)), as have indictments charging both transporting stolen property in interstate commerce and conspiring to do so. *Allen* v. *United States,* 89 F. 2d 954 (C. A. 4); *Carlson* v. *United States,* 187 F. 2d 366 (C. A. 10), certiorari denied, 341 U. S. 940.

3. Petitioner's argument that there was no proof of agreement to use the mails, and hence insufficient evidence to support the conspiracy count (Pet. 24–26), misconceives the evidence required to support a charge of conspiracy to violate the mail fraud statute.[4] There need not be proof of agreement as to any particular mailing. It is sufficient that there be proof that the scheme to defraud in which the parties joined contemplated the use of the mails in furtherance thereof. *Mansfield* v. *United States, supra; United States* v. *Cohen,* 145 F. 2d 82 (C. A. 2), certiorari denied, 323 U. S. 799.

There was in this case ample evidence that the scheme to defraud contemplated the use of the mails. The plan to have a friend send the tele-

[4] The conspiracy count is established if petitioners are shown to have agreed to commit either one of the substantive offenses charged, since a conspiracy to commit a multiplicity of offenses is no different in legal effect than a conspiracy to commit a single offense. Cf. *Braverman* v. *United States,* 317 U. S. 49. We, therefore, limit our discussion to the mail fraud conspiracy.

BLEED THROUGH– POOR COPY

gram signed "Curtis" (See Statement, *supra,* pp. 8–9) was consummated by mail. Pereira's bank account in El Paso, Texas, was opened a few days after Brading had borrowed the first $5,000 for Pereira, on the day that Brading flew to El Paso to meet his co-conspirator (R. 71, 188–189), and it is evident that both parties contemplated that during the courtship which followed checks would be drawn on that account from other parts of the country and mailed for collection. Even as to the particular mailing which formed the basis of the substantive counts, there was evidence from which the jury could properly infer that Brading knew of the contemplated use of the mails. He was with Mr. and Mrs. Pereira when they looked at the hotel in Greenville, and he drove with them to Dallas. After the wife in Dallas tried to call her broker in California to sell the securities, Pereira obtained the option from "Wilson" (See Statement, *supra,* p. 7). Moreover, Brading came to Pereira's home shortly before the proceeds of the check were to be collected and left with him early in the morning on the day that the check was cleared (R. 98–99). All these circumstances, together with the close association of the two throughout the venture, were clearly sufficient to justify the conclusion that Brading knew about and agreed to the contemplated clearance of the California check.

4. Contrary to petitioners' contention (Pet. 26–27), there was ample evidence to show that

BLURRED COPY

the check was cleared through the mails. The Vice President of the State National Bank at El Paso testified that when the check was deposited for collection it was sent directly to the drawee bank in Los Angeles by mail (R. 192–193). A clerk in the El Paso bank testified that petitioner Pereira had presented the check at his window, and that he personally had sent it to Los Angeles for collection (R. 202).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
HOWARD ADLER, JR.,
Attorneys.

JUNE 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

BLEED THROUGH– POOR COPY